UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

ANGELA HARPER

Plaintiff-Intervenor,

v.

STARLIGHT, LLC,

Defendant.

NO. CV-06-3075-EFS

ORDER ENTERING THE COURT'S RULINGS FROM JULY 25, 2008 HEARING

A hearing occurred in the above-captioned matter on April 23, 2008. Teri L. Healy appeared on behalf of Plaintiff Equal Employment Opportunity Commission ("EEOC"); James E. Davis appeared on behalf of Plaintiff-Intervenor Angela Harper;[1] and Gary E. Lofland appeared on behalf of Defendant Starlight LLC. Before the Court was Defendant's Motion for Summary Judgment. (Ct. Rec. 25.) After reviewing the

[1]For ease, Plaintiff EEOC and Plaintiff-Intervenor Ms. Harper will collectively be referred to as "Plaintiff."

submitted material, relevant authority, and hearing oral argument, the Court was fully informed and denied Defendant's motion. This Order serves to memorialize and supplement the Court's oral rulings.

I. Background[2]

Defendant operates a restaurant and bar that employs approximately forty (40) employees in Ellensburg, Washington. (Ct. Rec. 50 at 1-2.) Plaintiff is an African American Muslim born on May 9, 1984. *Id.* at 2. As part of her religion, Plaintiff wears a scarf on her head (hijab) for modesty. *Id.* Plaintiff began working for Defendant on May 20, 2004, as a dishwasher - she was twenty years old. *Id.*

Shortly after starting, Plaintiff asked Carly Goodin, Defendant's dining room manager, if she could work as a waitress. *Id.* Ms. Goodin agreed, and Plaintiff picked up lunch and weekend breakfast waitress shifts - these shifts are the least lucrative shifts. (Ct. Recs. 43 at 6; 50 at 2.) In June 2004, Jolene Hunter replaced Ms. Goodin as dining room manager. (Ct. Rec. 50 at 2.)

Doris Morgan is Defendant's sole member and general manager. Sometime early in Plaintiff's employ, Ms. Morgan asked her, "[s]o what's the deal with the thing on your head?" *Id.* at 3. After Plaintiff explained the hijab's purpose, Ms. Morgan asked if Plaintiff could "wear a fancier headdress" because she did not "understand the whole Muslim faith." *Id.*

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[2]In a motion for summary judgment, the facts are set forth in a light most favorable to the nonmoving party - here, that is Plaintiff. *Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999).

In the winter of 2004, Plaintiff asked Ms. Hunter to assign her as a waitress during the dinner shift or as a cocktail waitress - these shifts are the most lucrative shifts. (Ct. Recs. 43 at 6; 50 at 3.) No positions were available. Ms. Hunter provided Plaintiff a drink menu and told her to study it, advising her that a position would be available when she returned from vacation in the summer of 2005.

Plaintiff started to work one (1) to two (2) dinner shifts per week, but only because she covered other employees (shifting schedules were common because Defendant primarily employed college students). (Ct. Rec. 50 at 3.) Between 2004 and 2005, Defendant hired eight (8) individuals to fill dinner and cocktail shifts. (Ct. Rec. 43 at 6.) All were white. *Id.* In March 2005, Plaintiff expressed her frustration to Ms. Morgan that others were being hired to work dinner and cocktail shifts even though she had worked hard and had been there longer. *Id.*

Ms. Morgan regularly held meetings with managers to discuss business and employee performance. (Ct. Rec. 50 at 6.) During a regular meeting on August 2, 2005, Ms. Hunter, the manager who directly supervised Plaintiff, stated that it was unfair to keep Plaintiff on the lunch shift because she was a fine, dedicated waitress who was "ready to move up" and work dinner shifts. (Ct. Rec. 42-6 at 77.) Ms. Morgan disagreed. Her resistance was unusual considering she did not directly supervise Plaintiff and spent most of her time upstairs working on the books. (Ct. Rec. 43 at 7.)

When asked to explain her resistance, Ms. Morgan insisted that the kitchen staff complained about Plaintiff and, more importantly, that she appeared to be "frazzled" and lacking the calm needed for the dinner

shift. (Ct. Rec. 50 at 4.) Ms. Hunter responded that appearing "frazzled" is not out of character during the lunch shift because it is understaffed - one employee covers several tables. (Ct. Rec. 42-6 at 78.)

Ms. Hunter then suggested that Plaintiff work as a cocktail server because it is faster paced and "may work better for her personality." *Id.* at 79. Ms. Morgan disagreed again, stating that she did not want Plaintiff "cocktailing out there." (Ct. Rec. 42-6 at 79.) When asked why, Ms. Morgan answered that she wants "really gorgeous girls to cocktail." (Ct. Rec. 50 at 4.)

Ms. Morgan's explanation confused Ms. Hunter considering Plaintiff was constantly complemented on being gorgeous and exotic. *Id.* When pressed, she clarified, "[w]ell, what I meant is I want hot white girls, like Emily." *Id.* at 4. Ms. Morgan insisted that she is not a bigot; rather, she does not think that "the head dress and her being Muslim . . . [is] what we want in the bar." (Ct. Rec. 42-6 at 80.)

Plaintiff was vacationing in Florida when these comments were made. (Ct. Rec. 50 at 5.) After returning and learning about the comments, Plaintiff confronted Ms. Morgan on August 15, 2005. Ms. Morgan told Plaintiff "it's not - it wasn't about your race it was more about your scarf thing . . . . [Y]ou know how people in Ellensburg are? They're not gonna want to see, you know, a girl like that on the cocktailing shift . . . . [I]t was a business decision, it was nothing against you." (Ct. Rec. 42-4 at 28.)

Ms. Morgan proceeded to offer Plaintiff a position as a cocktail server. (Ct. Rec. 50 at 5.) Plaintiff construed the offer as insincere,

declined it, and resigned that same day. (Ct. Rec. 43 at 9.) After the conversation, Ms. Morgan returned to her office in a near frantic state. *Id.* She paced around the office stating that she could not have said that, that she needed to call her attorney, and that this could get her in trouble. *Id.*

Plaintiff sought alternative employment at several different restaurants - none were hiring. *Id.* at 6. In mid-November 2005, Plaintiff discovered she was pregnant. *Id.* After talking with her husband, Plaintiff decided not to seek alternative employment and instead become a "stay-at-home mom." *Id.*

II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Once a party has moved for summary judgment, the opposing party must point to specific facts establishing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant the summary judgment motion. *Id.* at 322. "When the moving party has carried its burden of [showing that it is entitled to judgment as a matter of law], its opponent must do more than show that there is some metaphysical doubt as to material facts. In the language of [Rule 56], the nonmoving party

must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted) (emphasis in original opinion).

When considering a motion for summary judgment, a court should not weigh the evidence or assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This does not mean that a court will accept as true assertions made by the non-moving party that are flatly contradicted by the record. *See Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

The Ninth Circuit sets a high standard for granting summary judgment in employment discrimination cases because "the ultimate question is one that only be resolve through a 'searching inquiry' - one that is most appropriately conducted by the factfinder, upon a full record." *Schnidrig v. Columbia Mach.*, 80 F.3d 1406, 1410 (9th Cir. 1996)

B. Title VII Discrimination Claims

Title VII makes it an unlawful employment practice "to discriminate against . . . any individual because of [her] race, color, [or] religion . . . ." 42 U.S.C. 2000e-2(b). The Supreme Court articulated two (2) employment discrimination theories: the first is disparate treatment, the second is disparate impact. *Hazen Paper Co. v. Biggins*, 507 U.S. 604,

609 (1993). Here, Plaintiff's claim is based on disparate treatment, which occurs when an employer treats an employee less favorably because of her membership in a protected class. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

Defendant argues that Plaintiff's Title VII claim fails under the *McDonnell Douglas* burden-shifting analysis[3] because there is no evidence that any inappropriate statements about race or religion were made during her employ. (Ct. Rec. 26 at 6.) Defendant's reliance on the *McDonnell Douglas* burden-shifting analysis is misplaced because discrimination claims can survive summary judgment based on direct evidence alone. *See Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 812 (9th Cir. 2004). The *McDonnell Douglas* burden-shifting analysis is actually reserved for scenarios where there is no direct discrimination evidence and a plaintiff must rely on circumstantial evidence to prove discrimination. *See AARP v. Farmers Group, Inc.*, 943 F.2d 996, 1000 n.7 (9th Cir. 1991). The proper procedure, therefore, is to determine if direct discrimination evidence exists and, if not, then proceed under the burden-shifting analysis.

"Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (citations omitted); *see also Enlow*, 389 F.3d 812 (noting that, in the context of an ADEA claim, direct evidence is "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly

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[3] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

reflecting the allegedly discriminatory attitude . . . sufficient to permit the fact finder to infer that the attitude was more likely than not a motivating factor in the employer's decision.") When a plaintiff offers direct evidence of discriminatory motive, a triable issue as to the employer's actual motivation is created even if the evidence is not substantial. *Godwin*, 150 F.3d at 1221.

Viewing the evidence in Plaintiff's favor, Plaintiff presents sufficient direct discrimination evidence to preclude summary judgment. Plaintiff sought a promotion from the lunch and weekend breakfast shifts to the dinner and cocktail shifts. Even though Plaintiff's direct supervisor viewed her as qualified, Ms. Morgan rejected the shift switch, indicating that she preferred to have "hot white girls, like Emily." Ms. Morgan went on to explain that "the head dress and her being Muslim . . . [is] not what we want in the bar." (Ct. Rec. 42-6 at 80.) True, these comments were not made in Plaintiff's presence, but Plaintiff heard about the comments. When confronted by Plaintiff, Ms. Morgan stated that "it wasn't about your race it was more about your scarf thing . . . . [Y]ou know how people in Ellensburg are? They're not gonna [sic] want to see, you know, a girl like that on the cocktailing shift . . . . [I]t was a business decision, it was nothing against you." (Ct. Rec. 42-4 at 28.)

A jury could conclude that Ms. Morgan's alleged statements, if believed, prove discriminatory animus without inference or presumption. *See Godwin*, 150 F.3d at 1221. This evidence is more than sufficient to meet Ninth Circuit standards for surviving summary judgment. *See, e.g., Lindahl v. Air France*, 930 F.2d 1434 (9th Cir. 1991) (direct evidence of sexual stereotyping where employer believed that the female candidates

get "nervous" and "easily upset"); *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145 (9th Cir. 1997) (direct evidence of race discrimination where employer referred to a Mexican-American employee as a "dumb Mexican"); *Sischo-Nownejad v. Mered Cmty. Coll. Dist.*, 934 F.2d 1104 (9th Cir. 1991) (direct evidence of age and gender bias where employee referred to female plaintiff as "an old warhorse" and to her students as "little old ladies.") Accordingly, summary judgment on this issue is not appropriate.[4]

C. Constructive Discharge

Defendant next argues that Plaintiff's constructive discharge claim fails because her working conditions were not objectively intolerable and she quit without attempting to resolve her differences with Ms. Morgan. (Ct. Rec. 26 at 10.) Plaintiff counters that there are genuine factual issues as to whether her resignation was reasonable under the circumstances. (Ct. Rec. 40 at 17.)

"[C]onstructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000); *see also Watson v. Nationwide Ins., Co.*, 823 F.2d 360 (9th Cir. 1987) (noting that

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[4]Because there is sufficient direct discrimination evidence to preclude summary judgment, the Court need not engage in the *McDonnell Douglas* burden-shifting analysis.

constructive discharge is found where a working environment is so intolerable and discriminatory as to justify a reasonable employee's decision to leave). This test is objective; the plaintiff need not show that the employer subjectively intended to force the employee to resign. *Satterwhite v. Smith*, 744 F.2d 1380, 1383 (9th Cir. 1984). "As a result, the answer turns on the facts of each case." *Id.* at 1382.

Generally, a single isolated instance of employment discrimination is insufficient as a matter of law to support a constructive discharge finding. *Nolan v. Cleland*, 686 F.3d 806, 813 (9th Cir. 1982). The Ninth Circuit requires more - specifically, "aggravating factors" that demonstrate a continuous pattern of discriminatory treatment over months or years. *Watson*, 823 F.2d at 361; *see also Nolan*, 686 F.2d at 813-14 (finding four differential treatment incidents over a two-year period created a genuine factual issue for the jury).

This "high standard" is predicated on the notion that Title VII policies are best served when parties attack discrimination within the context of their existing employment relationship, rather than when the employee walks away and then later litigates whether [her] employment was intolerable." *Watson*, 823 F.2d at 361.

For the reasons articulated on the record, while the question is close, a reasonable fact finder could conclude that Plaintiff was driven from the workplace. The Ninth Circuit's decision in *Satterwhite* is instructive. In *Satterwhite*, the plaintiff, who was black, worked as a "casual sweeper" for the Port of Tacoma. 744 F.2d at 1381. Casual sweepers fill in when permanent employees are absent. *Id.* When hired, the Port informed the plaintiff that he would get a permanent position

when available. This did not occur. Instead, plaintiff continued to work as a casual sweeper even though the Port regularly promoted white men. *Id.* Sometimes the plaintiff had to train these men. *Id.* at 1383. The Port's reason for denying the plaintiff a promotion - that he lacked railroad experience - turned out to be pretext for discriminating against him because he was black. *Id.* The plaintiff's supervisor relegated him to working in "the rope room," a dull job that left him with virtually no hope for career advancement. The Ninth Circuit concluded that the district court, when faced with these facts, did not err in concluding that the plaintiff's employment conditions were intolerable and discriminatory. *Id.*

The facts here are similar. Plaintiff worked the lunch and weekend breakfast shifts, occasionally assisting with the more lucrative dinner and cocktail shifts when other employees were absent. Plaintiff asked Ms. Hunter - several times over several months - to be switched permanently to the dinner and cocktail shifts. Allegedly there were no openings. During this time, however, Ms. Morgan hired five (5) individuals to fill dinner and cocktail shifts. All were white. Much to Plaintiff's displeasure, she had to train a few of these women for the position she sought. Viewing the evidence in Plaintiff's favor, Defendant's stated reason for keeping Plaintiff on the lunch shift - that she was too "frazzled" to work on the dinner shift - could be considered mere pretext for discriminating against her because she was an African American Muslim. When pressed about her reasoning, Ms. Morgan stated that she'd prefer "really gorgeous girls to cocktail" - gorgeous *white* girls.

Title VII contemplates parties "attacking discrimination" within the employment relationship instead of aggrieved employees walking away and later litigating whether their work environment was tolerable. *Watson*, 823 F.2d at 361. Plaintiff did so. After learning about Ms. Morgan's comments, Plaintiff confronted her directly. Plaintiff hoped Ms. Morgan would sit down with her "and get this all cleared up." (Ct. Rec. 42-4 at 33.) That did not happen. Instead, Ms. Morgan justified her comments and actions, calling them "business decisions" driven by Ellensburg's demographics, telling Plaintiff, "it's not - it wasn't about your race it was more about your scarf thing . . . . [Y]ou know how people in Ellensburg are? They're not gonna want to see, you know, a girl like that on the cocktailing shift . . . ." (Ct. Rec. 42-4 at 28.)

This case also does not involve a "single isolated instance" of employment discrimination. *Watson*, 823 F.2d 361. Discrimination began when, early on in Plaintiff's employment, Ms. Morgan asked, "[s]o what's the deal with the thing on your head?" (referring to Plaintiff's hijab); it was evident when Plaintiff was passed over for promotion to the dinner and cocktail shifts on five (5) occasions;[5] it existed when Ms. Morgan revealed her preference for hiring "hot white girls" to work the dinner and cocktail shifts; and it was apparent when Ms. Morgan informed

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[5]Although Plaintiff's Statement of Material Facts (Ct. Rec. 43) indicates that eight (8) women were hired to fill dinner and cocktail shifts between 2004 and 2005, only five (5) positions were filled from January 2005 on - when Plaintiff expressed interest in transferring to the dinner and cocktail shifts.

Plaintiff that the people of Ellensberg were not ready to see "a girl like [her]" on the cocktailing shift.

True, Ms. Morgan did offer Plaintiff a cocktailing position on August 15, 2008, after her confrontation. But viewing the evidence in Plaintiff's favor, Ms. Morgan's after-the-fact promotion offer was disingenuous, a mere Potemkin village designed to mask Ms. Morgan's disparaging comments and appearance of impropriety.

Moreover, in a small work environment where Ms. Morgan remains a supervisor, a reasonable employee in Plaintiff's position, like the plaintiff in *Satterwhite*, could feel trapped in an intolerable environment and compelled to leave. This is a question for the jury. *See Watson*, 823 F.2d at 361 (acknowledging that whether conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury).

D. Wages

Defendant argues that Plaintiff is not entitled to lost wages because she voluntarily left employment on August 15, 2005; Defendant alternatively argues that Plaintiff is not entitled to back pay after November 15, 2005 - the day Plaintiff discovered she was pregnant - because she voluntarily withdrew from the labor market and decided to become a "stay-at-home mom." (Ct. Rec. 26 at 11.) Plaintiff's response is two-fold: (1) Defendant does not meet its burden of demonstrating that there were suitable positions available; and (2) Plaintiff only decided to start a family after she could not find alternative employment. (Ct. Rec. 40 at 20.)

For the reasons articulated on the record, the Court finds that Plaintiff's lost wages and back pay claims are questions for the jury. The Court alternatively finds that Defendant did not meet its burden of demonstrating that Plaintiff failed to mitigate her damages.

Employees who are victims of discriminatory conduct are generally entitled to back pay provided the employee fulfills her statutory duty to mitigate damages. *See Thorne v. City of El Segundo*, 802 F.2d 1131, 1133-34 (9th Cir. 1986); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978).

To prevail on a claim for failure to mitigate damages, defendants must show that, based on the undisputed facts in the record, (1) there were substantially equivalent jobs available during the time in question that the plaintiff could have obtained, and (2) the plaintiff failed to use reasonable diligence in seeking alternative employment. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994) (citations omitted). Defendant bears the burden of demonstrating that the plaintiff failed to mitigate damages. *Id.*

Here, Plaintiff resigned from Defendant's employ on August 15, 2005. (Ct. Rec. 43 at 9.) Over the next three (3) months, she applied for several jobs without success. Unable to find work, Plaintiff decided to stop looking and start a family.

To meet its burden, Defendant must satisfy *both* prongs of the two-part test set forth above. *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463, 1474 (10th Cir. 1993). Defendant presented no evidence to satisfy the first prong, i.e., that there were substantially equivalent jobs available that Plaintiff could have

obtained. Instead, Defendant emphasizes that Plaintiff failed to use reasonable diligence in seeking alternative employment because she voluntarily withdrew from the labor market to care for her expected child.[6] This may be true. But without satisfying the first prong, evidence that Defendant meets the second prong is unhelpful. *Aguinaga*, 993 F.2d at 1474.

III. Conclusion

Accordingly, **IT IS HEREBY ORDERED:** Defendant's Motion for Summary Judgment **(Ct. Rec. 25)** is **DENIED.**

IT IS SO ORDERED. The District Court Executive is directed to enter Order and provide copies to counsel.

DATED this 4th day of August 2008.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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[6] *See Thorne*, 802 F.2d at 1135 n.3 (noting that a court properly denies back pay when the plaintiff: (1) fails to remain in the labor market, (2) refuses to accept substantially equivalent employment, (3) fails to diligently search for alternative work, or (4) voluntarily quits alternative work without good reason).